IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

FAO.No. 296 of 2007()

AGAINST THE ORDER DATED 24/08/2007 IN IA.2584/07 IN OS.405/2007 of PRL.SUB COURT,IRINJALAKUDA

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APPELLANT/PETITIONER/PLAINTIFF:

PAUL, S/O. EDAKULATHUR DEVASSY,
POTTA VILLAGE AND DESOM, MUKUNDAPURAM TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT: RESPONDENT/DEFENDANT:

SUKUMARAN, S/O. PULIKAL PRABHAKARAN,
PUTHANCHIRA VILLAGE, KOMBATHU KADAVU DESOM,
MUKUNDAPURAM TALUK.

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 15/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NO.296 OF 2007

Dated this the 15th day of October, 2007

JUDGMENT

Raman, J.

Appellant is the plaintiff and also the petitioner in I.A.No.2584/2007 in O.S.No.405/2007. The suit was one for specific performance of the agreement for sale. Pending suit the petitioner/appellant prayed to restrain the lst defendant from alienating or committing waste in the property. According to him, the property belonged to the respondent and he agreed to sell the property for a consideration of Rs.1,25,000/- per cent. On the date of agreement i.e. on 25/10/2006 an amount of Rs.5,00,000/- was paid towards sale consideration. Subsequently on 12/11/2006 a further amount of Rs.5,00,000/- more was paid. As per agreement, sale has to be executed on or before 8/6/2007. Though the petitioner was ready and willing to execute the sale deed by paying the balance consideration, the defendant evaded from execution. It is also averred that the property, which is the subject matter of agreement, is mortgaged by the defendant in the bank and he has not discharged that liability.

Petitioner is prepared to discharge the liability to the Bank and in case the defendant is not prepared to execute the sale deed, he prayed that the same may be executed by allowing to deposit the balance consideration in the court. Respondent filed his objection. Agreement is admitted. Receipt of Rs.10,00,000/- is also admitted. According to the respondent/defendant, he has given the family membership certificate, tax receipt, encumbrance certificate etc. But the petitioner was not ready to execute the sale deed and he did not pay the balance consideration. Petitioner is engaged in real estate business. Incidentally, it is stated that the petitioner was also arrested by the police for some illegal money transaction. In the meantime, the respondent had entered into an agreement for purchase of another property by paying Rs.6 lakhs and as a result of the failure of performance of the contract by the petitioner herein the amount which the respondent paid towards the said purchase got forfeited. Subsequently, the respondent also entered into an agreement with other person for sale of the property for higher amount.

2. The evidence consists of Exts.A1 to A3 on the side of the petitioner and Exts.B1 to B8 on the side of the respondent. No oral evidence was tendered by either side. The court below found that there is

a major violation of the agreement prima facie due the fault on the part of the respondent. But both sides have exchanged notices. According to the respondent, based on Ext.B1 agreement with one Kochavu, he forfeited Rs.6 lakhs and Ext.B2 is an agreement subsequently entered into with one Sujth. Considering the above facts, the court below thought that if the property is wasted or sold, more inconvenience would result to the petitioner. At the same time, it is to be considered that the respondent has a case that the petitioner has no balance consideration with him. If by paying Rs.10 lakhs with liability to pay huge amount of Rs.50 lakhs remaining further alienation is prevented, it will cause loss to the respondent. Considering these aspects of the matter, injunction was granted subject to deposit of balance sale consideration in a Nationalised Bank in the name of the petitioner with lean noted in favour of the court and in case the deposit is not made, it was further directed that it is open to the respondent to sell the property to others. However even that will be subject to a statutory charge over the property for having paid Rs.10 lakhs and interest, which is a statutory charge available to the vendee under Section 55(6)(b) of the Transfer of Property Act. It is the said order that is challenged in this appeal.

3. We find that subsequent to the order made the appellant has sought for extension of time as admitted in the affidavit filed along with I.A.No.3736/2007 before this Court and the time for payment, even according to the petitioner, was extended till 15/10/2007 and the further averment in the affidavit is that if the said extension is not further granted, it will result in a situation where with the expiry of the period for payment of money, if the amount is not deposited, then the injunction stands vacated automatically. Therefore, it is averred that the interim injunction granted by the court below is retained dehors the conditions imposed in the interim order. When the matter came up for consideration before this Court on 8/10/2007, it was admitted by the learned counsel for the petitioner that an application for extension of time was made. Since two applications were made before the court below, he wants to ascertain as to whether in fact the application for enlargement of time was already made by the petitioner and having got extended the time as prayed for and whether he could maintain the present appeal. The learned counsel sought time for producing the copy of the affidavit filed before the court below. Today, the learned counsel made available the copy of the same for perusal. The averment made in the affidavit filed along with the petition

seeking extension of time is that he could not make the deposit and the defendant had mislead him to think that the matter is likely to be settled. Since he was under the impression that there is scope for settlement, he wants further time. In such circumstances, the court below granted him time.

4. Further the learned counsel for the appellant placing reliance on the decision of the Apex Court in **Sukhbir Singh and others v. Brij Pal Singh and others (AIR 1996 SC 2510)** contended that it is not a condition that the respondent should have ready cash with them. The fact that they attended the Sub Registrar's Office to have the sale deed executed and waited for the seller to attend the office is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money for payment at the time of registration. The Apex Court held that it is sufficient for the buyer to establish that he had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with him from the date of the suit till date of the decree. But the Apex Court made clear that the court below had exercised the discretion for granting the relief of specific performance to the respondent on sound principles of law. Whether ultimately Specific

Performance relief should be granted to the petitioner or not is yet to be considered in the final proceedings by the court. Therefore, these are all matters where the court below certainly will bestow consideration to arrive at a conclusion as to whether ultimately there was any failure to perform the contract on the part of the appellant herein. While considering the interim application for injunction, this being a discretionary remedy the court below thought that what is paid is only a paltry sum. Considering the balance amount of consideration yet to be paid, since this being a specific performance suit, the court below thought that an opportunity could be given to the appellant to deposit the money before the court itself. It cannot be said that the discretion has not been exercised properly especially in the present case, because the petitioner subsequent to the order passed, sought time for making the deposit. His preparedness to deposit the amount is made known to the court and the court acted on the basis of the request so made. It is after the expiry of the extended period that the present appeal is preferred. In such circumstances, the petitioner is estopped from raising a contention against the interim order now passed. However, we consider it necessary that the petitioner should be given some more time and in the larger interest of

justice we extend the time for depositing the amount as directed by the court below by one month from today. Subject to the above, we find no reason to interfere with the order impugned in the appeal.

Appeal is disposed of as above.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

kcv.